TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 307

C. A. HUDSON AND R. R. BROGAN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 2, 1926

CERTIORARI GRANTED APRIL 19, 1926

(31,739)

(31,739)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1926

[fol. 1] [Captions omitted]

IN UNITED STATES DISTRICT COURT

THE UNITED STATES

vs.

THE McKEESPORT GAS COMPANY, C. A. HUDSON, R. R. BROGAN, and J. E. Crossland (Whose True First Names are Unknown)

Attorneys: Walter Lyon, F. C. McCutcheon, for United States; Frank P. Patterson, B. B. McGinnis, for defendants.

[fol. 2] DOCKET ENTRIES

Counts 1-6: Using the United States mails in a scheme to defraud.

Nov. 12, 1920.—A true bill.

Nov. 12, 1920.—Indictment filed.

Nov. 12, 1920.—Recognizance of defendant J. E. Crossland for Nov. T. 1920, taken and filed.

Nov. 17, 1920.—Recognizance of R. R. Brogan for May T. 1921, taken and filed.

Nov. 29, 1920.—Recognizance of C. A. Hudson for May T. 1921, taken and filed.

Mar. 4, 1921.—Order filed and entered fixing bail of C. A. Hudson and R. R. Brogan at $3,000 each.

Mar. 23, 1921.—Recognizance of R. R. Brogan taken and filed.

May 10, 1921.—Motion and Order for Nolle Prosequi as to McKeesport Gas Company, a corporation, filed and entered.

May 10, 1921.—Nolle Prosequi as to McKeesport Gas Company, a corporation, filed and entered. J. Wood Clark, Clerk.

May 27, 1921.—Motion and Order for Nollo Prosequi as to J. E. Crossland filed and entered.

May 27, 1921.—Nollo Prosequi as to J. E. Crossland hereby entered. J. Wood Clark, Clerk.

Jan. 19, 1925.—Petition and order for subpœna duces tecum filed and entered.

Jan. 19, 1925.—Subpœna duces tecum and copy issued.

[fol. 3] Feb. 3, 1925.—Defendants C. A. Hudson and R. R. Brogan plead Nolo Contendere.

Feb. 14, 1925.—Sentence of the Court is that you C. A. Hudson be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for the term of one year and one day.

Feb. 14, 1925.—Sentence of the Court is that you R. R. Brogan be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for the term of one year and one day.

Feb. 14, 1925.—Temporary Commitment (2) and (2) copies issued.

Feb. 14, 1925.—Final Commitment (2) and (2) copies issued.

Feb. 17, 1925.—Temporary Commitments (2) returned and filed.

Feb. 19, 1925.—Order endorsed on original sentence of C. A. Hudson as follows:—Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted. Robert M. Gibson, District Judge.

Feb. 19, 1925.—Order endorsed on original sentence of R. R. Brogan as follows:—Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted. Robert M. Gibson, District Judge.

Feb. 19, 1925.—Petition of C. A. Hudson for Writ of Error, jurat, order allowing Writ of Error and fixing supersedeas bond in the sum of $10,000 filed and entered.

[fol. 4] Feb. 19, 1925.—Assignment of Error filed.

Feb. 19, 1925.—Petition of R. R. Brogan for Writ of Error, jurat, order allowing Writ of Error and fixing supersedeas bond in the sum of $10,000 filed and entered.

Feb. 19, 1925.—Assignment of Error filed.

Feb. 24, 1925.—Citations (2) awarded and issued.

Feb. 24, 1925.—(2) Writs of Error issued and copy lodged in the Clerk's office.

Feb. 25, 1925.—Service of Citations (2) accepted by Walter Lyon, U. S. attorney.

Mar. 3, 1925.—Order on Petition of C. A. Hudson for Writ of Error reducing amount of bond to $5,000.00 entered.

Mar. 3, 1925.—Order on Petition of R. R. Brogan for Writ of Error reducing amount of bond to $5,000.00 entered.

Mar. 3, 1925.—Bond of C. A. Hudson for appearance pursuant to Mandate of Circuit Court of Appeals taken and filed.

Mar. 3, 1925.—Bond of R. R. Brogan for appearance pursuant to Mandate of Circuit Court of Appeals taken and filed.

Mar. 9, 1925.—Final Commitments (2) returned and filed. (Not executed.)

Mar. 19, 1925.— Præcipe re contents of record sur Writs of Error, filed.

Mar. 25th, 1925.—Bill of Exceptions signed, sealed and filed.

[fol. 5] IN UNITED STATES DISTRICT COURT

INDICTMENT—Filed November 12, 1920

Sections 215 and 37 of the Criminal Code

WESTERN DISTRICT OF PENNSYLVANIA, ss:

The Grand Jurors of the United States of America duly empaneled and sworn in the District Court of the United States for that district, upon their oaths, present:

That at all times the fifth day of December, 1919, to the time of the filing of this indictment, The McKeesport Gas Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office in the City of McKeesport, County of Allegheny and State of Pennsylvania, and that the authorized capital stock of the said corporation was one million dollars divided into one million shares, each of the par value of $1.00;

That on, to wit, the dates specified in the last paragraphs of the counts of this indictment, at the Western District of Pennsylvania, and within the jurisdiction of this Court, the said McKeesport Gas Company, C. A. Hudson, (whose true first name is to the Grand Jurors unknown), R. R. Brogan, (whose true first name is to the Grand Jurors unknown) and J. E. Crossland, (whose true first name is to the Grand Jurors unknown), named as defendants herein

[fol. 6] and hereafter referred to as the defendants, had theretofore, devised a scheme and artifice to defraud F. M. Stringer, Mrs. Joseph Sinfelt, Joseph R. Partridge, Anna F. Hallam and John P. McCullough, and divers other persons whose names are to the Grand Jurors unknown (a class of persons residing within the United States and not susceptible by reason of their great number and lack of information on the part of the Grand Jurors of being named herein, but comprising any and all persons whom the defendants could induce to purchase stock of The McKeesport Gas Company, said persons being hereinafter referred to as the persons to be defrauded) of their money and property in and by inducing by fraudulent representations, pretenses and promises and by fraudulent artifices and devices said persons to be defrauded to part with their money and property in the purchase of shares of the capital stock of the said McKeesport Gas Company, said scheme and artifice being more particularly set forth as follows:

It was intended by said defendants as a part of said scheme and artifice that they, the said defendants, should sell and offer for sale to the said persons to be defrauded capital stock in The McKeesport Gas Company; that they, the said defendants should fix arbitrarily the prices at which the said stock should be sold and offered for sale to the persons to be defrauded, and that they, the said defendants, should offer said stock to the said persons to be defrauded at prices forming a gradual ascending scale beginning at the par value of said stock, it being the intent and purpose of the said defendants in so doing to lead the per- [fol. 7] sons to be defrauded into believing that the company was in a strong financial condition and growing stronger in degree indicated by the increased prices at which said stock should be sold and offered for sale;

And it was intended by the said defendants as a further part of said scheme and artifice that certain large and unearned blocks of stock should be allotted to the said defendants, C. A. Hudson and R. R. Brogan, and that such stock should be issued on order signed by the said defendants, C. A. Hudson and R. R. Brogan, it being the intent and purpose of said defendants to sell such stock to the said persons to be defrauded by deceiving them into believing that

they would be purchasing treasury stock and that the proceeds of such sales would be applied to the development and expansion of the properties of the said McKeesport Gas Company;

And it was intended by said defendants as a further part of said scheme and artifice to sell, offer for sale and cause to be sold and offered for sale to the said persons to be defrauded shares of the capital stock of the said McKeesport Gas Company, and for the purpose of inducing the said persons to be defrauded to part with their money and property in the purchase of said stock so intended to be sold and offered for sale, the said defendants in substance intended falsely and fraudulently to represent, pretend and promise to said persons to be defrauded and to each of them, that The McKeesport Gas Company's holdings comprised about five hundred (500) acres and were in a proven field; that the officers and directors of The McKeesport Gas Company were men of integrity and very favorably known as upright [fol. 8] men of affairs; that The McKeesport Company guaranteed to drill twenty-one (21) wells in the McKeesport field and seventeen (17) of them would be drilled on large holdings which had gas production for 25 or 30 years; that the officers of the McKeesport Gas Company figure on future extensive developments not only on their large acreage in the McKeesport field, but in other gas and oil districts; that the progress made on April 1, 1920, indicated that in fifteen days The McKeesport Gas Company should have a large production of gas which mean dividends; that from April 1, 1920, to April 10, 1920, any one could buy from the company direct, at the rate of $1.50 per share, one-half as many shares as he then owned;

And each of the aforesaid representations, as the defendants and each of them then and there knew, were and would be false and fraudulent, and the said defendants intended thereby to deceive and defraud said persons to be defrauded and to induce said persons to be defrauded to part with their money and property in the purchase of said stock as aforesaid;

And it was a further part of said scheme and artifice that the said defendants should each appropriate and convert to his and its own use, in the form or guise of salary, draw-

ing account, expenses, commissions and profits arising from the sale of promotion stock, part of the money and property which would be paid by the said persons to be defrauded in the purchase of said stock of the said McKeesport Gas Company, as aforesaid; but the exact form in which each of the said defendants intended thus to convert and appropriate to his and its own use such part of said money and property [fol. 9] and the exact amount thereof that each of said defendants intended thus to appropriate and convert are to the Grand Jurors unknown;

And the said defendants so having devised and intended to devise the aforesaid scheme and artifice, did on the 5th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice and attempting so to do, unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office in the City of McKeesport, County of Allegheny, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addresses thereof, a certain letter enclosed in a post-paid envelope addressed to M. F. [illegible] Stringer, Jefferson County, Adena, Ohio, a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, [fol. 10] and that probably by the time this letter reaches you the first well will be in. After one of the severest winters experienced in many years, we are glad to be able to report to you the progress made by the Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Bradford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which is reported doing ten million feet, is down 2,800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

Well No. 3, down 1,400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1,555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1,400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 and 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up 8 and 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which [fol. 11] as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, being a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting for the gas to come in when they will rush in and buy.

In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bona fide stockholders of record as of this date. This opportunity ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 215, U. S. C. C.)

Second Count

And the Grand Jurors aforesaid on their oaths aforesaid do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the [fol. 12] last paragraph thereof;

And the Grand Jurors aforesaid do further present that on the 2nd day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at McKeesport, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addressee thereof, a certain letter enclosed in a post-paid envelope addressed to Mrs. Joseph Sinfelt, Munson, Pa., a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, and that probably by the time this letter reaches you the first well will be in. After one of the severest winters ex- [fol. 13] perienced in many years, we are glad to be able to report to you the progress made by the Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Bradford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which is reported doing ten million feet, is down 2,800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

Well No. 3, down 1,400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1,555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1,400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 & 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up, 8 & 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which

as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, be-
[fol. 14] ing a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting for the gas to come in when they will rush in and buy. In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bona fide stockholders of record as of this date. This opportunity ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

Special—Only good for 10 days from date only—Special.

April 1st, 1920.

McKeesport Gas Company, 120 Fifth Ave., McKeesport, Pa.:

Enclosed find remittance for — dollars payment in full for — shares McKeesport Gas Co. stock at $1.50 per share.

[fol. 15] Special to stockholders only.
Name: —— ——.
Town: ——. State: ——.
All cash—no time.
Not good after April 10th, 1920.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Secs. 215, U. S. C. C.)

Third Count

And the Grand Jurors aforesaid, on their oaths aforesaid do hereby reaffirm, reallege and reincorporate as if herein

set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof:

And the Grand Jurors aforesaid do further present that on the 3rd day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at McKeesport, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of [fol. 16] the United States to the addressee thereof, a certain letter enclosed in a postpaid envelope addressed to "Mr. Joseph R. Partridge, Box 291, Houtsdale, Pa.," a copy of which said letter being as follows, to wit:

J. V. Harsha, President. L. F. Savage, V. Pres. and Gen'l Mgr. J. E. Crossland, Secty. and Treas.

McKeesport Gas Company, Moose Temple Building, 120 Fifth Avenue, McKeesport, Pa.

April 1st, 1920.

"Personal"

Stockholders of the McKeesport Gas Co.:

It gives us great pleasure to report in this, our first letter to you that your Company is now on the eve of production, and that probably by the time this letter reaches you the first well will be in. After one of the severest winters experienced in many years, we are glad to be able to report to you the progress made by the — Company to date.

Well No. 1, down 500 feet, work stopped awaiting to see what the well beside it gets at the Branford Sand, they getting no gas in the Speechley. If they do not get gas we will abandon number one and spend the money on some other location.

Well No. 2, about fifty feet from the Hodges well which

is reported doing ten million feet, is down 2800 feet, and should be in the Speechley Sand by the time this letter reaches you. Those who claim to know say our location is the best of the two.

[fol. 17] Well No. 3, down 1400 feet and is being piped to take the gas in the Murrysville Sand which will be reached at about 1555 feet, our neighbor there getting about two million feet in this sand.

Well No. 4, down 1400 feet slightly delayed by a bent stem. This location looks extra good as the Fisher well is reported getting twenty-two million, the Grandview Drilling Company well fourteen million, and the Weill well sixteen million, all of which are close to our number four well.

Well No. 5, on the Keddy Acreage the rig is up, 8 & 10 inch casing on the ground, drilling to start soon.

Well No. 6, on the McClure lease rig up, 8 & 10 inch casing on the ground, drilling operations will soon begin.

This progress means that inside of the next fifteen days your Company should have a large production of gas which as you know means dividends to you. Now there is a portion of unsold stock left, and we are going to give you, being a stockholder of record, the chance to increase your holdings before offering it to the public at large, who are only awaiting the gas to come in when they will rush in and buy. In other words, you are going to profit by taking advantage of this opportunity.

From April first and including April tenth, you can buy from us direct for cash, money order or check by using the enclosed blank, one-half as many shares as you now own at $1.50 per share. This offer is extended only to bonafide stockholders of record as of this date. This opportunity [fol. 18] ends midnight, April tenth and no orders will be accepted unless they are in the mails by that time.

We feel that this Company has a brilliant future, and if you want to come along with us, fill out the enclosed blank and mail it today.

Yours very truly, McKeesport Gas Company, by J. E. Crossland.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Sec. 215, U. S. C. C.).

FOURTH COUNT

And the Grand Jurors aforesaid upon their oaths aforesaid, do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof:

And the Grand Jurors aforesaid, do further present that on the 7th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at Pittsburgh, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of [fol. 19] the United States to the addressee thereof, a certain letter enclosed in a postpaid envelope addressed to "Anna F. Hallam, 26 Coulter St., Crafton, Pa.," a copy of which said letter being as follows, to wit:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Avenue, Pittsburgh, Pa.

Main 757. Court 4934

April 6th, 1920.

Special Announcement to Our Friends

Your judgment was good when you selected McKeesport Gas Company stock as an investment.

The first proof came April fourth, Easter Sunday, when their well #2 came in reported doing eight million and have twelve or fifteen feet yet to go. The high wind Sunday night blew the top off of the rig which will be repaired and the well finished which should increase the flow quite materially, the gas is now in the line.

Well #3 came in Easter Sunday, reported doing two million in the Murrysville Sand, awaiting a line to take the gas.

Well No. 4, not far from the Grandview Drilling Company well which is reported doing between thirteen million and fourteen million, the Fisher No. 4 reported making twenty-two million and the Weill well reported making sixteen million feet, should be in this month. In our opinion this will make a splendid well.

[fol. 20] Well No. 1 standing awaiting developments on the adjoining lease.

Wells No. 5 and No. 6 on the McClure and Keddy acreage across the Yough River rigs up and casing on the ground drilling will start soon.

We are enclosing a buying order giving you an opportunity to increase your holdings in this stock at $2.00 per share, (subject to advance without notice) before the advance comes which is more than justified by the success up to date. Our advice is to buy all of this stock you can carry.

Yours very truly, Hudson-Brogan & Co., by C. A. Hudson.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 215 U. S. C. C.)

Fifth Count

And the Grand Jurors aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege and reincorporate as if herein set forth in full all the allegations of the first count of this indictment, except those allegations contained in the last paragraph hereof.

And the Grand Jurors aforesaid, do further present that on the 6th day of April, 1920, at the Western District of Pennsylvania and within the jurisdiction of this Court, the defendants so having devised and intending to devise the aforesaid scheme and artifice and for the purpose of executing the said scheme and artifice and attempting so to do, [fol. 21] did unlawfully, knowingly and feloniously place and cause to be placed in a Post Office of the United States, to wit, the Post Office at Pittsburgh, County of Allegheny and State of Pennsylvania, in the Western District of Pennsylvania, to be sent and delivered by the Post Office Establishment of the United States to the addressee thereof, a

certain letter enclosed in a post paid envelope addressed to "John P. McCullough, 1715 Suburban Ave., City," a copy of which said letter being as follows, to wit:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Avenue, Pittsburgh, Pa.

Main 757. Court 4934

April 6th, 1920.

Special Announcement to Our Friends

Your judgment was good when you selected McKeesport Gas Company stock as an investment.

The first proof came April fourth, Easter Sunday, when their well #2 came in reported doing eight million and have twelve or fifteen feet yet to go. The high wind Sunday night blew the top off the rig which will be repaired and the well finished which should increase the flow quite materially, the gas is now in the line.

Well No. 3 came in Easter Sunday, reported doing two million in the Murrysville Sand, awaiting a line to take the gas.

[fol. 22] Well No. 4, not far from the Grandview Drilling Company well which is reported doing between thirteen million and fourteen million, the Fisher No. 4 reported making twenty-two million and the Weill well reported making sixteen million feet, should be in this month. In our opinion this will make a splendid well.

Well No. 1 standing awaiting developments on the adjoining lease.

Wells No. 5 and No. 6 on the McClure and Keddy acreage across the Yough River rigs up and casing on the ground drilling will start soon.

We are enclosing a buying order giving you an opportunity to increase your holdings in this stock at $2.00 per share, (subject to advance without notice) before the advance comes which is more than justified by the success up to date. Our advice is to buy all of this stock you can carry.

Yours very truly, Hudson-Brogan & Co., by C. A. Hudson.

against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec 215 U. S. C. C.)

Sixth Count

And the Grand Jurors aforesaid on their oaths aforesaid, do further present that the said defendants, The McKeesport Gas Company, C. A. Hudson, (whose true first name is to the Grand Jurors unknown) R. R. Brogan, (whose true first name is to the Grand Jurors unknown) and J. E. [fol. 23] Crossland (whose true first name is to the Grand Jurors unknown) continuously through the period of time from the 5th day of December, A. D. 1920, to the time of the filing of this indictment, in the County of Allegheny, State of Pennsylvania, Western District of Pennsylvania, and within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously did conspire, combine, confederate and agree together and with divers other persons to said Grand Jurors unknown, to commit divers offenses against the United States, to wit, the divers offenses charged against the said defendants in the divers counts of this indictment preceding this count and made offenses by Section 215 of the Criminal Code of the United States; and that said defendants did thereafter do divers acts to effect the object of said unlawful and felonious conspiracy, to wit, not only the several acts of placing letters, circular letters, advertisements and publications in the Post Office of the United States in the Cities of McKeesport and Pittsburgh, County of Allegheny, State of Pennsylvania aforesaid, described in said several preceding counts, but numerous acts of preparing said letters, circular letters, advertisements and publications for mailing, of making the false and fraudulent pretenses, representations and promises in the first count of this indictment described, and obtaining by means thereof the moneys of persons belonging to the class of persons in said count mentioned, as well as certain other overt acts, now here specified; that is to say:

[fol. 24] Overt Acts

In furtherance of said conspiracy and to effect the object thereof, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, in the Western District of Pennsylvania, did maintain an office at 230-232 Fifth Avenue, said office being maintained between December 5, 1919, and June 1, 1920;

And further to effect the object of the said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of McKeesport, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did maintain an office in the Moose Temple Building, 120 Fifth Avenue, said office being maintained between December 5, 1919, and April 1, 1920;

And further to effect the object of said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did on the 14th day of January, 1920, execute an order for the issuance of stock in the McKeesport Gas Company as follows:

Hudson-Brogan & Co., Investments, Room 129 Union Arcade, Pittsburgh, Pa.

January Fourteenth, 1920.

[fol. 25] Mr. K. E. Crossland, Secy. & Treas., McKeesport Gas Company, McKeesport, Pa.

Dear Sir: Please issue 17,156 shares to the following parties, named in the amounts mentioned hereto attached. In the ratio of 3 shares of Company stock and 2 shares of stock charging our cash account for 10,293 3/5 shares and issuing from our stock 6,822 2/5 shares.

Very truly yours, Hudson-Brogan Co., by R. R. Brogan.

EG.

P. S.—Enclosed find check for $25,000.—#1876 which credit to our account.

Hudson Brogan & Co., per Brogan.

And further to effect the object of said conspiracy and pursuant thereto, the defendants, The McKeesport Gas Company, C. A. Hudson, R. R. Brogan and J. E. Crossland, in the City of Pittsburgh, County of Allegheny, State of Pennsylvania, and within the jurisdiction of this Court, did on the 18th day of May, 1920, execute an order for the issuance of stock in The McKeesport Gas Company, as follows:

Hudson-Brogan & Co., Investments, 11th Floor 5th Ave. Arcade Bldg., 230-232 Fifth Ave., Pittsburgh, Pa.

May Eighteenth, 1920.

[fol. 26] Mr. J. E. Crossland, Moose Temple, McKeesport, Pa.

Dear Sir: Kindly issue the following certificates to the amount of 1394 shares in the names hereto attached, and charge to our stock account.

Yours very truly, Hudson-Brogan & Co., by R. R. Brogan.

B/EB.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 37 U. S. C. C.)

D. J. Driscoll, United States Attorney.

Back or Cover of Indictment, with Plea and Judgment

Witnesses: √Elsa M. Smith, Gertrude Middleton, John Sinfelt, S. B. Anderson, √John P. McCullough, Anna Hallam, George A. Alsop, J. E. White, Emma Recomm, Harry Campbell, Ira L. Clear, Edward Brown, √O. B. Williamson.

The above witnesses whose names are checked sworn by me this 12th day of November, A. D. 1920.

Thos. E. Morgan, Foreman.

[fol. 27] In United States District Court

Bill of Exceptions

Caption

Be It Remembered that this case came on for trial on the 3rd day of February, A. D. 1925, before the Hon. Robert M. Gibson of the United States District Court at Pittsburgh, Pennsylvania, at which time the said C. A. Hudson and R. R. Brogan entered a plea of nolo contendere, in the course of which case the proceedings were as follows:

Plea

The defendants, C. A. Hudson and R. R. Brogan waive arrangement and plead nollo contendere in open Court, this 3rd day of February, 1925.

C. A. Hudson, R. R. Brogan.

Sentence—Filed February 14, 1925

And now to wit, February 14th, A. D. 1925, the sentence of the Court is, that you be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the term of one year and one day and be subject to the same discipline and treatment as convicts sentenced by the Courts of the State; and while so confined therein you shall be exclusively under the control of the officers having charge of the said [fol. 28] Federal Penitentiary; and stand committed until this sentence be complied with. Sentence to run from this date.

Per Curiam.

G.

Attorney for defendant excepts to the foregoing sentence and at his request bill is hereby sealed and exception noted.

Robert M. Gibson, District Judge. [Seal.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The defendants, C. A. Hudson and R. R. Brogan, contending that sundry errors were committed in the proceedings of said case, tender the foregoing Bill of Exceptions to the actions and rulings of the said Court, and pray that the same may be settled and sealed and made a part of the record, and it is so accordingly done and ordered this 25th day of March, A. D. 1925.

Robert M. Gibson. [Seal.]

[fol. 30] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR OF DEFENDANT

R. R. BROGAN—Filed February 19, 1925

And now, to-wit: this 19th day of February, 1925, came the defendant, R. R. Brogan, by his counsel, Neil W. McGill, H. D. Montgomery and B. B. McGinnis, Esqs., and in connection with his petition for a Writ of Error herein, makes the following assignment of error, which he states occurred on the trial:—

The learned Court erred in imposing on the defendant, R. R. Brogan, a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after having accepted a plea of nollo contendere.

Neil W. McGill, H. D. Montgomery, B. B. McGinnis,
Attorneys for Defendant, now Plaintiff in Error.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR OF DEFENDANT C. A. HUDSON—Filed February 19, 1925

And now, to wit, this 19th day of February, 1925, came to the defendant, C. A. Hudson, by his counsel, Neil W. McGill, H. D. Montgomery and B. B. McGinnis, Esqs., and in

connection with his petition for a Writ of Error herein, makes the following assignment of error, which he states occurred on the trial:

"The learned Court erred in imposing on the defendant, [fol. 31] C. A. Hudson, a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after having accepted a plea of nollo contendere."

Neil W. McGill, H. D. Montgomery, B. B. McGinnis,
Attorneys for Defendant, now Plaintiff in Error.

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD

J. Wood Clark, Esq., Clerk:

Please take notice that the printed record for the appeal in the above entitled case will consist of the following:

1. Docket Entries.
2. Indictment.
3. Pleas.
4. Sentences.
5. Assignments of Error.
6. Bill of Exceptions.
7. Praecipe re: Contents of Record Sur Writ of Error.

And the plaintiffs in error ask the Court to deliver to them the above papers for the purpose of causing the same to be printed.

B. B. McGinnis, Frank P. Patterson, Attorneys for
Plaintiffs in Error.

[fol. 32] And now, to wit, March 19th, 1925, service of the above notice accepted, and the five-day notice required by District Rule No. 39 is hereby waived.

Warren H. Vankirk, Attorney for the United States.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1925

No. 3335 (List No. 18)

C. A. Hudson et al., Plaintiffs in Error,

vs.

United States, Defendant in Error

In Error to the District Court of the United States for the Western District of Pennsylvania

Order Assigning Judge—Filed October 15, 1925

And now, to wit, this 15th day of October, A. D. 1925, it is ordered that Hon. William Clark, District Judge for the District of New Jersey, be, and he is hereby, assigned to sit in above case in order to make a full court.

Per Curiam.

Buffington, J., Circuit Judge.

[File endorsement omitted.]

[fol. 34] Minute entry of argument and submission October 15, 1925, omitted in printing.

[fol. 35] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Western District of Pennsylvania

Before Buffington and Woolley, Circuit Judges, and Clark, District Judge

Opinion—Filed December 3, 1925

Woolley, Circuit Judge:

The indictment against Hudson and Brogan contains six counts; the first five, drawn under Section 215 of the Criminal Code, charge use of the mails with intent to defraud; and the last, drawn under Section 37 of the Criminal Code, charges conspiracy to commit the offenses named in the previous counts. The penalties for offenses of both kinds are fine or imprisonment, or both. 35 Stat. 1130, 1096.

On being arraigned, Hudson and Brogan (whom we shall call the defendants) tendered pleas of nolo contendere. The court accepted them and imposed sentences of imprisonment. The defendants then sued out this writ of error and, challenging the action of the court, have raised the question: Has a federal district court, after accepting a plea of nolo contendere, power to impose a sentence of imprisonment? The answer turns on the nature of the plea [fol. 36] and the character of the penalty prescribed for the offense to which the plea is directed.

The plea of nolo contendere was long known at common law. It was there regarded not as a plea of right but as a plea of grace to be accepted or refused by the court in its discretion. This was because the plea was neither one of guilty nor one of not guilty but rather an appeal for mercy. Being in form a declaration by the accused that "he will not contend with the" prosecuting authority under the charge, it was not, in the strict sense of that term in the criminal law, a plea at all. It was, however, treated as a plea and its effect, when entered, was that of confession of guilt, and on a record thus made sentence could validly be

imposed; but the confession, implicit in the plea, could not be used against the defendant in any civil suit for the same act. This, briefly, was the common law understanding of the plea of nolo contendere, and, in the absence of federal statutes providing for its use or varying its meaning, this also is the nature of the plea in federal jurisprudence.

The next question—when upon such a plea may a court impose a sentence of imprisonment—is fraught with more difficulty, involving distinctions between the use of the plea in cases for major and minor offenses and between sentences where imprisonment is, under the statute, either mandatory or discretionary with the court.

The defendants, relying upon decisions at common law which hold the plea not applicable in capital cases and upon decisions which hold it applicable in cases where a defendant desires "to submit to a small fine," maintain that when the plea is accepted in a case where, as here, the statute provides a penalty by fine or imprisonment a federal court is without power to impose a penalty of imprisonment and is limited to the alternative penalty of a fine. The infirmity of this position is disclosed by the authorities cited and the reasoning of the opinion in Tucker vs. United States, 196 [fol. 37] Fed. (C. C. A. 8th) 860. In that case the court cited nearly all the cases on the subject that have come to our attention and, reviewing many of them, pursued a line of reasoning to which we subscribe and to which we refer for the ground of our decision.

Unquestionably at common law the plea could not be accepted in capital cases. Whether it was applicable in cases of felony where the punishment was by imprisonment alone is not clear. With equal certainty the plea was accepted in cases where the punishment was by a fine alone. There the English decisions seem to stop.

In America the trend of state decisions is toward the acceptance of the plea in cases where the punishment is by fine or imprisonment. This, while persuasive, is not controlling on federal courts. United States vs. Thompson, 251 U. S. 407. Nor does the decision in the Tucker case control the instant case on the facts, for there the plea was entered to the indictment wherein some counts charged offenses whose punishment was by imprisonment alone and

therefore mandatory upon the court and other counts charged offenses whose punishment was by fine or imprisonment and therefore discretionary with the court. Yet the reasoning in that case and in the companion case of Shapiro vs. United States, 196 Fed. 268; 235 U. S. 412, shows the rule, which is:

(a) The plea of nolo contendere is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment must be by imprisonment, with or without a fine; (b) but it is applicable, and, if tendered, may be accepted in a case where the punishment may be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone, —in any event without limitation (except that of the statute) upon the size of the penalty.

[fol. 38] The sentence of the court validly came within the last classification and therefore its judgment is affirmed.

[File endorsement omitted.]

[fol. 39] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Western District of Pennsylvania

Judgment—Filed December 3, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, December 3, 1925.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 19, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]307

FILED
MAR 2 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1926.

C. A. HUDSON, Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, And BRIEF IN SUPPORT THEREOF.

FRANK P. PATTERSON,
BERNARD B. McGINNIS,
Attorneys for Petitioner.

908 Park Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 210-212 GRANT ST., PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

NO. ..... OCTOBER TERM, 1926.

C. A. HUDSON, Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit,

And

Brief in Support Thereof.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of the undersigned respectfully shows:

That the Petitioner, on the 3rd day of February, 1925, waived arraignment and pleaded *nolo contendere* in open court before Honorable Robert M. Gibson, Judge of the United States District Court for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, to an indictment containing six counts, the first five counts charging the defendants with

having violated Section 215 of the Criminal Code, i. e., using the mails to defraud, and the sixth count charging the defendants with violating Section 37 of the Criminal Code, i. e., conspiring to commit the offenses charged in the first five counts of the indictment. On February 14, 1925, the Petitioner, C. A. Hudson was sentenced to be imprisoned in the Federal Penitentiary at Atlanta, Georgia, for and during the period of one year and one day.

That this case was duly appealed to the Circuit Court of Appeals for the Third Circuit from the District Court of the United States for the Western District of Pennsylvania, and came on to be heard by the Circuit Court of Appeals at No. 3335 on the 15th day of October, 1925, and that on the 3rd day of December, 1925, the opinion of the Circuit Court of Appeals was delivered and filed, affirming the judgment of the District Court.

That the question involved before the Circuit Court of Appeals was: Has a Federal District Court, after accepting a plea of *nolo contendere,* power to impose a sentence of imprisonment in a Federal Penitentiary?

That the decision of the Circuit Court of Appeals, Third Circuit, in the present case, is in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, *Tucker vs. United States,* 196 Fed., 260, and also in conflict with instructions of the Attorney General of the United States issued July 1, 1925 to United States Attorneys, which instructions state that the plea of *nolo contendere* "should be accepted only in cases punishable solely by fine."

That unless the aforesaid conflict of decisions of two Circuit Courts of Appeals is clarified it will result in incalculable confusion and uncertainty in the Federal Courts.

That the decision of the said Circuit Court of Appeals, Third Circuit, is contrary to the common law as interpreted by the Federal Courts.

That the decision of the said Circuit Court of Appeals deprives your petitioner of his liberty without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled *"C. A. Hudson and R. R. Brogan, Plaintiffs-in-Error, vs. United States, Defendant-in-Error,* No. 3335 October Term, 1925," to the end that said case may be reviewed and determined by this Court, as provided in the Judicial Code, Section 240, or that your petitioner may have

such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed and remanded by this Honorable Court.

And your petitioner will every pray.

.....

Petitioner.

State of New York,
County of ..... } *ss*:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, C. A. Hudson, who, being duly sworn according to law, deposes and says: He has read the foregoing petition; the same is true to his knowledge, information and belief; his knowledge is derived from the record and from what has taken place in his presence and hearing in the proceedings of this case.

.....

Sworn to and subscribed before me this ..... day of ....., A. D. 192.....

.....

Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

Dated at Pittsburgh, Pennsylvania, this ..... day of ..... A. D. 192.....

.....

Counsel for Petitioner.

Brief in Support of Petition.

The District Court below erred in imposing on the defendant a sentence of one year and one day to the Federal Penitentiary at Atlanta, Georgia, after accepting a plea of *nolo contendere,* and the Circuit Court of Appeals for the Third Circuit should have reversed the judgment below for the reasons assigned in the said record in this case.

In the case of *Tucker vs. United States,* 196 Fed., 260, decided by the Circuit Court of Appeals, Eighth Circuit, January 2, 1912, the effect of a plea of *nolo contendere* was involved and decided contrary to the decision of the Circuit Court of Appeals, Third Circuit, in the present case.

The opinion of the Circuit Court of Appeals in the case at bar reads:

> (a) The plea of *nolo contendere* is not applicable, and, if tendered, cannot be accepted in a case where, under a statute, the punishment ***must*** be by imprisonment, with or without a fine;

(b) but it is applicable, and, if tendered, may be accepted in a case where the punishment *may* be by fine alone, although the offense may as well be punishable by imprisonment; and (c) when so tendered and accepted the sentence may, in the court's discretion, prescribe both fine and imprisonment, or imprisonment or fine alone—in any event without limitation (except that of the statute) upon the size of the penalty.

The effect of this is that a Federal Court may not impose a prison sentence upon a plea of *nolo contendere* if the statute demands imprisonment but may do so if the statute permits imprisonment. It is respectfully submitted that this is wholly irreconcilable with the opinion in *Tucker vs. United States*, 196 Fed., 260 U. S. Circuit Court of Appeals, Eighth Circuit, which declares,

> "The rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed upon conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term with or without fine."

The necessary effect of this is that the Court may not impose sentence of imprisonment upon the plea of *nolo contendere.*

It does not appear in the record in this case, but a perusal of the indictment in the Tucker case shows that the indictment charged violations of Sections 3296, 3326, 3324, 3455 and 3317 of the Revised Statutes. The punishment for violating Sec-

tion 3455 R. S. is "a fine of not less than $1,000.00 nor more than $5,000.00, or to imprisonment for not less than six months or more than five years, or to both, at the discretion of the Court." Concerning this, the Court in the Tucker case said:

> "So it was within the authority of the prosecuting officer to elect to stand, for the purpose of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such plea. Were the subsequent proceedings consistent with acceptance of the plea in that view we are satisfied that no reversible error would appear in allowance thereof. * * * Moreover, the judgment is alike inconsistent with acceptance of the plea as above defined, in pronouncing imprisonment in the penitentiary for eighteen months."

The Tucker case, therefore, clearly decides that the plea was properly accepted in that case as applying to certain counts which contained charges punishable by fine or imprisonment or both, but that imprisonment in the penitentiary for eighteen months was "inconsistent with acceptance of the plea."

We beg to quote further from the Tucker case, 196 Fed., 260, as follows:

> "(2) The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine,' necessarily implies, as we believe, that the case for such allowance must be within the class of misdemeanors for which punishment may be im-

posed by *fine alone,* although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum—we have no doubt. This provision, however, for such purpose in the submission—as the object sought by the defendant in electing to submit without contest —requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized—however desirable it may seem—without statutory provision therefor. In arriving at such conclusion, we have not overlooked the settled doctrine that such

short terms of imprisonment were not 'infamous punishments' as defined in England and America for more than a century (see *Mackin vs. United States*, 117 U. S., 348, 351, 6 Sup. Ct., 777, 29 L. Ed., 909, and *Fitzpatrick vs. United States, ante*), nor the fact that imprisonment, at the time the rule was adopted, was frequently made the alternative of fines, or imposed together with a fine for 'crimes of inferior nature' (2 Cooley's Black, book 4, p. 5) 'in which the public punishment is not severe, but affords room for private compensation'—imposed also for commercial indebtedness —and was regarded with far less opprobrium than attaches to every form of imprisonment at the present day. Neither of these considerations appears to have entered into the framing of the rule, and we are not at liberty to adopt a different rule for application to the case at bar."

"(3) The contention, however, that the trial court was without jurisdiction to allow the plea under the indictment in the present case, we believe to be untenable, notwithstanding the foregoing interpretation of the rule. It is undoubted that the counts of the indictment, charging an offense for which at least three months' imprisonment must be imposed with a fine, are not within such interpretation, but other counts (as above mentioned) charged offenses which *may be punished by fine alone, and thus furnish ground for entertaining the nolo contendere plea,* as 'in the nature of a compromise' between the prosecutor and the defendant."

* * * * * * * *

That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the *nolo contendere* plea as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining *the amount of fine to be imposed*, but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. *Com. vs. Horton*, 9 Pick. (Mass) 206; *Com. vs. Ingersoll*, 145 Mass., 381, 382, 14 N. E., 449. The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea (*Com. vs. Ingersoll, supra*), thus leaving it unsupported for want of either of the authorized pleas to the indictment.

The judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law. (Italics ours.)

On the same day, the same Court, basing its decisions on the reasons set forth in the Tucker case, reversed the District Court in the case of *Shapiro vs.*

United States, 196 Fed., 268, and in the case of *Blum vs. United States,* 196 Fed., 269.

In the Shapiro case, it appears that the indictment in some counts charged offenses which demanded a penalty of imprisonment without the alternative of a fine, and that other counts demanded penalties of either imprisonment or a fine, or both. It also appears from the record that the district attorney entered *nolle prosequi* as to those counts, the penalty for which was either a fine or imprisonment, or both, and that the plea of *nolo contendere* was accepted by the District Court as to those counts which required imprisonment, and that thereupon the Court sentenced Shapiro to imprisonment for two years and pay a fine in the sum of $10.000 in addition to the costs. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law. It seems that thereupon the District Court refused to accept the plea of *nolo contendere,* (probably for the reason that only prison counts remained), and directed the defendant to plead to the indictment. The defendant stood mute and the Court entered for him a plea of not guilty. Subsequently, by leave of Court, the plaintiff filed three special pleas to which the Government demurred and the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, and the defendant was sentenced to imprisonment for two years and to pay a fine of $5,000. The case was then brought directly to the Supreme Court of the United States and is reported in 235 U. S., 412.

The Supreme Court granted the motion to dismiss because of lack of jurisdiction, but we submit that the opinion of the Supreme Court is an affirmation of the decision in the Tucker case, 196 Fed., 260, and we quote from the decision of the Supreme Court in the Shapiro case as follows:

> "* * * Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere:* (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment, 196 Fed. Rep., 268. The grounds of the reversal are set forth in its opinion in *Tucker vs. United States*, 196 Fed. Rep., 260,—a case, decided at the same time, which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; *that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise';* and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdic-

tion of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the *judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea;* and hence that the record failed to show an authorized plea to support the judgment. *Id.*, pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.' ".

"* * * The motion to dismiss must be granted. *Aspen Mining Co. vs. Billings,* 150 U. S., 31; *Brown vs. Alton Water Co.,* 222 U. S., 325; *Metropolitan Water Co. vs. Kaw Valley District,* 223 U. S., 519; *Union Trust Co. vs. Westhus,* 228 U. S., 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere*

as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited." (Italics ours.)

We submit the following from *Ruling Case Law* and *Corpus Juris*:

"The allowance of the 'implied confession' as a *nolo contendere* plea, thus defined to be the defendant's yielding to mercy in the punishment, 'and desiring to submit to a small fine' necessarily implies that the case for such allowances must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offenses may as well be punished by imprisonment at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine. That such desire (or request, express or implied) on the part of the accused 'to submit to a small fine' can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be im-

posed within the exercise of judicial discretion—that 'a small fine' is thus mentioned in the rule as a relative term, intending substantially less than the maximum,—there is no doubt. So defined, the rule affords no ground for entertaining the plea either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor, for which the punishment must be imprisoned for any term, with or without a fine."

Ruling Case Law, 8 R. C. L., Page 117.

"Under the common-law rule which governs in the federal courts, to authorize the court to entertain a plea of *nolo contendere*, the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may be punishable as well by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine."

Corpus Juris, Criminal Law, Page 405.

Instruction to United States Marshals, Attorneys, Clerks and Commissioners, July 1, 1925, page 178, reads:

"*Pleas of Nolo Contendere* 1060. In any case where the statute upon which the indictment is based requires imprisonment as the sole or

partial punishment, consent should be refused to the plea of *nolo contendere* and objection made to its acceptance, as such acceptance would prevent punishment by imprisonment. It should be accepted only in cases punishable solely by fine. (See 196 Fed., 260, and 235 U. S., 412)."

Section 222, Vol. 1, Zolines Federal Criminal Law and Procedure, reads as follows:

"The plea of *nolo contendere* is a declaration on the part of the defendant that he will not contend with the prosecution. Under the common law rule, which governs in our Federal Courts, the plea of *nolo contendere* was in the nature of a motion to submit to a small fine and was taken only in cases of slight misdemeanors. Hence imprisonment cannot be imposed upon a plea of *nolo contendere*."

It is respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision in the Tucker case as interpreted by Ruling Case Law, *Corpus Juris,* Zoline's Criminal Law, and the Attorney General of the United States, and will result in untold confusion in the various Federal Courts unless the question is clarified by a decision of the Supreme Court of the United States.

Respectfully submitted,

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Attorneys for Petitioner.

Notice of Application to the Supreme Court for a Writ of Certiorari.

The respondent is hereby notified that the petitioner will, on Monday, the ..... day of ...., A. D. 1926, upon his petition and a copy of the entire record in this cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of *certiorari,* and brief in support thereof, as hereinbefore set forth, are herewith delivered to you) to the Supreme Court of the United States in its court room at the Capitol in the City of Washington, D. C.

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Attorneys for Petitioner.

Service of the foregoing notice is hereby accepted, and the delivery of a copy thereof and of the petition for writ of *certiorari* and brief in support thereof, referred to therein, are hereby acknowledged this ..... day of ....., A. D. 1926.

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Attorney for Respondent.